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No. 91-1136

In the Supreme Court of the United States

October Term, 1991

ERWIN RAUTENBERG, et al.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent.

and

UNITED STATES OF AMERICA, et al.

Real Parties in Interest

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF PETITIONERS IN REPLY TO OPPOSITION

ROBERT S. GERSTEIN, Ph.D.
Attorney at Law
1717 Fourth Street, Third Floor
Santa Monica, California 90401
Telephone: (310) 393-5582

Counsel for Petitioners
ERWIN RAUTENBERG, et al.

19

QUESTION PRESENTED

Can a Court of the United States, consistent with due process of law, turn a protective order into a secret decree, denying the party required to obey it full access to it and forbidding that party from disclosing its terms or existence to others?

TOPICAL INDEX

Page

QUESTION PRESENTED i

TOPICAL INDEX ii

TABLE OF AUTHORITIES CITED iii

ARGUMENT 1

CONCLUSION 14

TABLE OF AUTHORITIES CITED

Page

Cases

Butterworth v. Smith
(1990) 110 S.Ct. 1376 9

Texts

Levi, *An Introduction to Legal Reasoning*,
(1948) University of Chicago 2

Livy, *The Early History of Rome*
(1973) Penguin 6

Miscellaneous

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BRIEF OF PETITIONERS IN REPLY TO OPPOSITION

I. REAL PARTY IN INTEREST HAS DONE NOTHING TO REFUTE PETITIONER'S SHOWING THAT THE ORDER IS RENDERED INHERENTLY VAGUE BY THE DENIAL OF FULL ACCESS TO IT.

The government contends that its refusal to let Petitioner and his attorneys have a copy of the order has

not reduced their ability to understand it, because the government *has* permitted Petitioner to see the order a few times in the nearly seven years it has been in existence, and has allowed some of his attorneys to see it during that time as well (Opp., pp. 8-10).

Real Party in Interest's argument on this issue misses the point. There is a great difference between, on the one hand, being allowed to read a document even several times under the stress created by limited time, the inability to take notes, official scrutiny, threats and duress, and, on the other hand, having a copy to review over time, as new thoughts germinate and new circumstances arise.

It is a familiar truth in the law that abstract language takes on constantly changing new significance when placed in the context of concrete circumstances as they develop. See Levi, *An Introduction to Legal Reasoning*, 27-31 (U. of Chicago 1948). Thus, language may appear too unimportant to notice in the abstract, but turn out to be of pivotal importance in the particular situation. It is this need to relate the language of the law to an ever-changing and inherently unpredictable reality which makes it essential for lawyers, and judges, to have the texts of statutes and decisions readily at hand, however frequently we may have studied them in the past.

The truth of this point is demonstrated by developments in these proceedings.

Real Party in Interest has conceded that the disclosure of the existence of the order, and of the government's intervention to obtain it, in the Ninth Circuit's published opinion, and this Court's order allowing the Petition herein then to be publicly filed as redacted, have wrought a *de facto* narrowing of the order. Now, Real Party in Interest states "the protective order guards only the contents of the order, not its existence and the government's role in securing it" (Opp., p. 15).

But this is not accurate. Real Party in Interest has revealed aspects of the *content* of the order as well. In its Response to Petitioner's Motion to File Under Seal (which this Court allowed to be filed publicly), Real Party in Interest reproduced verbatim a part of paragraph five of the order. Further, both there (p. 12) and in its Opposition (from which it proposes the seal should be lifted), Real Party in Interest described the order as requiring that

> "no evidence be adduced at trial concerning certain contacts with foreign governments and certain information pertaining to whether a

> confidential relationship existed between the United States and a specified private entity."
>
> Opp., p. 4.

This too makes *partial* disclosure of the content of the order. But just how much is disclosed, and what is it that Petitioner must still keep secret under threat of contempt? Without the opportunity to study the text of the order along with the pleadings which modify it, it is impossible to answer that question with confidence.

While partial disclosure of the order has narrowed its ambit somewhat, therefore, it has made the order more difficult to understand than ever. Now Petitioner must try to conform his conduct, not only with an order of which he has never received a copy, but that order *as modified to an uncertain extent* by a mosaic of partial disclosures in the pleadings which the government has filed publicly in this Court. The inherent vagueness of the order has only been exacerbated by the government's limited disclosures.

Further, Real Party in Interest's picture of access to the order is grossly inaccurate.

First, the stressful conditions set by the government for the occasions on which Petitioner has been allowed to see the order severely hampered his ability to understand and recall it.

On the first occasion described by Real Party in Interest, Petitioner was summarily *ordered* to come to his attorneys' offices to review the order and sign an acknowledgement of it under threat of immediate arrest and prosecution. He signed the acknowledgement only because he felt forced to do so (Declaration of Erwin Rautenberg, attached to Emergency Petition for Writ of Mandamus, paras. 4-7).

Because his tinnitus (Declaration of Erwin Rautenberg attached to Supplementary Petition for Writ of Mandamus, para. 5) made it impossible for him to recall the contents of the order, Petitioner was required to review the order again. This time government

attorneys gave him the impossible task of reading and memorizing the order while suffering under the strain of being deposed by them (Opp., p. 12-13; Declaration of Erwin Rautenberg attached to Petition for Writ of Mandamus, para. 10).

Petitioner's attorneys have been able to review the order only by the time-consuming and burdensome process of first getting permission from attorneys in the Justice Department in Washington (*not*, as the authors of the Opposition well know, by making a "reasonable request to the Office of the United States Attorney for the district in which Air-Sea's civil action is proceeding," Opp., p. 13), and then arranging with attorneys at the Justice Department office in Los Angeles to see it there (see Declaration of Matthew Steinberg, attached to Emergency Petition for Writ of Mandamus, para. 5).

Further, contrary to Real Party in Interest's representation that none of Petitioner's attorneys has been denied access to the order (Opp., p. 13, fn. 4),

Petitioner has described in detail the circumstances under which the author of the mandamus petition, Douglas Mirell, was denied that access (Petition, p. 11, Exh. "I").

To claim, as Real Party in Interest does, that such limited access to the language of the law does not limit the capacity to understand it is to deny not only the values inherent in the First Amendment to the Constitution, but history and common sense as well.

Historically, the crucial move from tyranny to the rule of law is made when a society ceases to give an elite few privileged access to the law, and makes it a public possession. Rome made its most important step from the oppressive monarchy of the Tarquins toward the Republic by the creation of the Twelve Tables, which displayed the text of the laws in the marketplace for all to see. Livy, *The Early History of Rome*, 247 (Penguin 1973). Here, no less than in ancient Rome, those who are governed by the law must be allowed unlimited access to its content if they are to be free of oppression.

In common sense terms, it is apparent that a person who does not have the text of the rules he must live by readily at hand cannot be expected to apply them to changing circumstances as they arise. Yet here, Petitioner is subject to punishment even for *inadvertent* violations of the protective order (Petition for Writ of Mandamus, Exh. "L", p. 2).

The terms of the protective order thus offer this Court a rare opportunity to affirm a principle so fundamental to free government that there has been no previous need for this Court to articulate it: that if free people are to be punished for the violation of legal rules, they must have free and unlimited access to the content of those rules. This Court should take that opportunity and grant the writ.

II. THE PROTECTIVE ORDER IS NO MERE LIMITATION ON DISCOVERY; IT PROHIBITS PETITIONER FROM DISCLOSING TO OTHERS INFORMATION KNOWN TO HIM, BOTH IN AND OUTSIDE OF THE COURTROOM, AND IS THEREFORE A PRIOR RESTRAINT IN VIOLATION OF THE FIRST AMENDMENT.

Real Party in Interest seeks to minimize the protective order's infringement of Petitioner's First Amendment rights by insisting that the order limits only Petitioner's right to discovery, and is not, therefore, an unconstitutional prior restraint (Opp., pp. 15-18).

This is belied by Real Party in Interest's own characterization of the order.

Real Party in Interest states that the order directed *both* that "no discovery be had and that *no evidence be*

adduced at trial concerning" certain matters (Opp., p. 4). If the protective order is directed *only* at limiting discovery, as Real Party in Interest represents (Opp., p. 18), its purpose would be served fully by prohibiting such discovery. There would be no need for the additional prohibition on Petitioner's adducing of such evidence at trial, because Petitioner would have no access to such evidence.

Real Party in Interest also seeks to make the order appear less sinister by describing it as the result of E-Systems' traditional Rule 26 motion to limit discovery, not a government initiative (Opp., p. 3). In fact, however, E-Systems' motion was not granted, but withdrawn. The government was the sole moving force behind the protective order (Response of United States to Petition for Writ of Mandamus, p. 5).

Further, if the order were only a limit on discovery, there would have been no reason for the government's refusal to limit punishment to "knowing and intentional"

violations (Petition for Writ of Mandate, Exh. "L", p. 2). It is hard to imagine how a discovery order could be violated in a manner not "knowing and intentional." Only an order prohibiting Petitioner from disclosing what he already knows to Petitioner could be violated inadvertently.

The order, and particularly its provision for punishment by contempt, is aimed, not at limiting Petitioner's discovery, but at silencing him, both in and out of the courtroom. Contrary to Real Party in Interest's assertions, therefore, it *is* a prior restraint on his freedom of speech, in violation of the First Amendment. *Butterworth v. Smith*, 110 S.Ct. 1376 (1990).

III. THE QUESTION OF WHETHER THERE WERE ADEQUATE MEANS FOR OBTAINING RELIEF FROM THE PROTECTIVE ORDER OTHER THAN BY WRIT OF MANDAMUS IS MOOT.

Real Party in Interest contends that the Circuit Court's decision not to grant Petitioner's Supplementary Petition was justified by the fact that Petitioner had an adequate remedy on appeal which of which he had failed to take advantage (Opp., pp. 8-10).

This argument was timely when Real Party in Interest made it in response to Petitioner's original Petition for Writ of Mandate (Response, p. 11-15). The Circuit Court rejected the argument, however, when on June 1, 1990 it conditionally granted the Petition, remanding the matter to the District Court, and retaining jurisdiction to review the District Court's disposition (Petition for Certiorari, Appen. A). In deciding to take substantive action on the petition, the Circuit Court

necessarily exercised its discretion to find that extraordinary relief *was* appropriate in this case, and to *grant* such relief.

In order to renew the "threshold" contention that a grant of extraordinary relief would be a "waste of judicial resources" (Opp., p. 10), therefore, Real Party in Interest must argue that the Circuit Court *abused* its discretion in granting the June 1, 1990 order.

But Real Party in Interest has not done this. Instead, Real Party in Interest purports to *defend* the Circuit Court's exercise of discretion in denying Petitioner's *Supplementary* Petition (Opp., pp. 9-10). Because, however, the Circuit Court denied the supplementary petition only after it had made its June 1, 1990 order and the District Court had carried out that order (Opp., pp. 6-7), the Circuit Court could not possibly have rejected the Supplementary Petition on the basis of a "threshold" judgment that Petitioner had no need to seek extraordinary relief from the protective order.

As, therefore, the threshold issue of the propriety of extraordinary relief was decided by the Circuit Court's order of June 1, 1990, it is now moot, and there is no reason for this Court to give it further consideration.

IV. REDACTED FOR PUBLIC FILING

CONCLUSION

It is time to end the elaborate system of artifice, including the filing with this Court of documents under seal or in redacted form, by which this protective order protects from public scrutiny information already known to all. This Court should grant the writ and squarely face the question of whether Real Party in Interest can justify the extraordinary departure from the rule of law inherent in this secret protective order.

For the reasons stated, Petitioner respectfully requests that the writ be granted, and that this Court give full consideration to the issues it raises on the merits.

In the alternative, Petitioner respectfully requests that this Court grant the writ and dispose of it summarily, modifying the protective order by striking the provisions that limit access to and disclosure of the order itself (or *at least* modifying it to reflect the de facto modifications already affected by this Court's order allowing the public filing of the redacted Petition).

Respectfully submitted,

ROBERT S. GERSTEIN
Counsel for Petitioner